

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MICHAEL W. HILL,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 03-160E
)	JUDGE SEAN McLAUGHLIN
JOHN LAMANNA, Warden,)	MAGISTRATE JUDGE LENIHAN
)	
Respondent.)	

MEMORANDUM ORDER

The Court of Appeals for the Third Circuit has remanded the matter for consideration of petitioner's claim of an ex post facto application of the Federal Parole Guidelines. It appears that all Courts of Appeals which have addressed the issue, save for the Third Circuit, have held that Federal Parole Guidelines are not "laws" to which the Ex Post Facto Clause applies. See, e.g., McKissick v. U.S. Parole Commission, 295 F.Supp.2d 643, 648 (S.D.W.Va. 2003) (collecting cases). The Third Circuit, however, held in a panel decision that the issue of application of the Ex Post Facto Clause to Federal Parole Guidelines involves a determination of whether the guidelines are applied with or without "substantial flexibility." United States ex rel. Forman v. McCall, 709 F.2d 852, (3d Cir.1983) (Forman I). The Court considered statistics offered concerning the percentage of times that a parole decision is made outside of the applicable guideline range in making this "flexibility" determination.

The soundness of the Forman I rationale was questioned on appeal after remand by a second panel to address the case. See, United States ex rel. Forman v. McCall, 776 F.2d 1156, 1159 (3d Cir.1985) (Forman II), cert. denied, Forman v. Baer, 476 U.S. 1119 (1986). Forman I was not overruled, however, since a subsequent panel may not overrule a prior panel decision, and the issue was not taken up by the Court en banc. The Forman II panel did, though, find that sufficient flexibility was shown so as to make the Ex Post Facto Clause inapplicable to the federal guidelines.

AND NOW, this 24th day of October, 2005, IT IS HEREBY ORDERED that respondent shall file a response addressed to petitioner's Ex Post Facto claim on or before November 15, 2005.



LISA PUPO LENIHAN
UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Sean J. McLaughlin
United States District Judge

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